

APR 25 2019

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No. 08-881

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**In the Supreme Court of the United States**

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MARTIN MARCEAU, ET AL., PETITIONERS

v.

BLACKFEET HOUSING AUTHORITY, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE FEDERAL RESPONDENTS  
IN OPPOSITION**

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### QUESTION PRESENTED

Whether a federal agency's pervasive control over Indian housing construction creates common-law trust duties that the agency owes to individual Indians.



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## **OPINIONS BELOW**

The opinions of the court of appeals (Pet. App. 1-45, 46-91, 92-121) are reported at 540 F.3d 916, 519 F.3d 838, and 455 F.3d 974. The order of the district court (Pet. App. 122-136) is unreported.

## **JURISDICTION**

The judgment of the court of appeals was entered on March 19, 2008. Petitions for rehearing were denied on August 22, 2008, and an amended opinion was issued on that date (Pet. App. 5). The petition for a writ of certiorari was filed on November 19, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In the late 1970s, the Department of Housing and Urban Development provided funding under the United States Housing Act of 1937, 42 U.S.C. 1437 *et seq.*, to the Blackfeet Housing Authority (Authority), which utilized the funding to construct houses on the Blackfeet Indian Reservation between 1977 to 1980. The Authority built those houses, including houses now owned by petitioners, with wood foundations constructed with pressure-treated lumber. Petitioners are American Indian homeowners who allege that their houses are defective and hazardous because they were built with foundations containing toxic chemicals. Petitioners brought this action in 2002 seeking money damages and declaratory and injunctive relief against the Department of Housing and Urban Development and its Secretary (collectively, HUD) and the Authority and its board members (collectively, Authority). Pet. App. 7-8.

As is relevant here, petitioners asserted a claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, seeking a declaratory judgment that HUD improperly authorized substandard housing, in violation of its own regulations, and injunctive relief mandating either the repair or the replacement of their houses. Pet. App. 23, 156-158. Petitioners also sought money damages for HUD's purported breach of Indian trust duties allegedly owed to petitioners by the government. *Id.* at 152-156.

The district court granted HUD's and the Authority's motions to dismiss. Pet. App. 122-136. Among other things, the court dismissed petitioners' APA claim because petitioners failed to show that HUD's actions were contrary to law, *id.* 132-133, and dismissed petitioners' Indian trust claim because none of the statutes or

regulations that petitioners invoked imposed relevant duties on HUD that might give rise to a cause of action under what the court styled the “*Mitchell Doctrine*,” *id.* at 124-132; *id.* at 126 (illustrating asserted doctrine with citations to *United States v. Navajo Nation*, 537 U.S. 488 (2003) (*Navajo I*), *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003) (*White Mountain*), and *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)).

2. a. The court of appeals affirmed the dismissal of petitioners’ claims against HUD but reinstated petitioner’s claims against the Authority. Pet. App. 92-121. As is relevant here, the court concluded that petitioners’ APA claim was barred by 5 U.S.C. 702 because it sought relief that was tantamount to money damages, Pet. App. 113-115, and that petitioners failed to show that “a grant of HUD funds” to the Authority gave rise to enforceable trust duties that might support their Indian trust claim, *id.* at 110-113.

b. The panel subsequently granted the Authority’s rehearing petition and issued an opinion revisiting all of the issues raised on appeal. That opinion on rehearing (Pet. App. 46-91) adhered to the panel’s prior holdings with one exception, reversing course on petitioners’ APA claim and remanding that claim for further proceedings. *Id.* at 68-71. Judge Pregerson, who had authored the panel’s original decision, dissented from the court’s renewed holding that petitioners failed to state an Indian trust claim against HUD. *Id.* at 71-91.

c. Both HUD and the Authority petitioned for rehearing, which the court of appeals denied. Pet. App. 5. However, in denying rehearing, the court replaced its original opinion on rehearing “in its entirety” (*ibid.*) with an amended opinion. *Id.* at 6-45. That opinion



modified the panel's rationale for reinstating petitioners' APA claim, *id.* at 22-25, and again upheld the dismissal of petitioners' Indian trust claim, *id.* at 10-22. The court concluded that the governing "statutes and regulations pertaining to the Blackfeet houses at issue" showed that HUD did not have an obligation to construct, maintain, or repair the houses at issue and that, therefore, it did not breach a trust duty that could give rise to an Indian trust claim. *Id.* at 15, 22. The court noted that, "[a]s with any grant of federal funds," the Authority had to satisfy "certain requirements \* \* \* to obtain and spend [HUD] funds." *Id.* at 22. But, it explained, the "federal government held no property—land, houses, money, or anything else—in trust," it "did not exercise direct control over Indian land, houses, or money by means of these funding mechanisms," and it "did not build, manage, or maintain any of the housing." *Ibid.*

Judge Pregerson again dissented regarding the Indian trust claim, Pet. App. 25-45, concluding that HUD funding gave HUD "pervasive control over [the Authority's] housing program." *Id.* at 44. He reasoned that "[t]he federal government undertook, as part of its treaty and general trust relationship, to assist the Blackfeet tribe to acquire decent, safe, and sanitary housing for low-income families," and that "[t]he tribe had little choice but to accept the government housing program." *Ibid.* In his view, "the government undertook to fulfill its trust responsibility to provide housing for the tribe and did so through a pervasive regulatory structure" and, for that reason, "the federal government \* \* \* had an obligation to perform [the task] in a manner consistent with its fiduciary duty to the tribe." *Id.* at 44-45. Based on the allegations in petitioners' complaint, he concluded that HUD failed to do so. *Ibid.*

### ARGUMENT

Petitioners contend (Pet. 8-43) that what they assert was the federal government's pervasive control over the construction of their homes by the Blackfeet Housing Authority imposed common-law trust duties on the government that HUD breached in this case. The court of appeals correctly affirmed the dismissal of that claim, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Petitioners' trust claim is premised on this Court's jurisprudence under the Indian Tucker Act, 28 U.S.C. 1505, and rests primarily on *Mitchell II*, *White Mountain*, and the Federal Circuit's (now reversed) opinion in *Navajo Nation v. United States*, 501 F.3d 1327 (2007). See Pet. i, 9-10. Petitioners argue (at 12, 14) that, while "the statutes in the instant case only establish a mechanism for lending [federal] money to tribal housing authorities," the federal government exercised de facto "pervasive control and supervision" over the Authority's construction of their homes and that HUD's "'pervasive' role \* \* \* defines the contours of the United States' [non-statutory, non-regulatory] fiduciary responsibilities" to petitioners. According to petitioners, "federal control or supervision is the key," and an agency's exercise of de facto control gives rise to trust duties even where the pertinent statutory or regulatory provisions do not. Pet. 15, 21. Petitioners thus contend that the court of appeals' rejection of their trust-based contentions conflicts with *Mitchell II*, *White Mountain*, and the Federal Circuit's decision in *Navajo Nation* (Pet. 8-21); and is contrary to petitioners' allegations and the government's purported history of exercising plenary control over Indian housing matters, Pet.

22-43. Those contentions are without merit and are now foreclosed by this Court's recent decision in *United States v. Navajo Nation*, No. 07-1410 (Apr. 6, 2009) (*Navajo II*).

a. As an initial matter, petitioners' trust claim suffers from a fatal jurisdictional defect. The doctrinal foundation for that claim rests on the limited waiver of sovereign immunity in the Indian Tucker Act, which authorizes Indian Tribes to sue the United States for money damages based on certain claims founded upon violations of federal statutes or regulations. See *Navajo II*, slip op. 2-3, 13-14 (discussing *Mitchell II* and *White Mountain*); see also *White Mountain*, 537 U.S. at 472-473; *Mitchell II*, 463 U.S. at 211-212, 214-218. Petitioners, who are individual Indians and not Tribes, presumably assert their claim under the Tucker Act, 28 U.S.C. 1491(a)(1), which provides a similar waiver for claims of non-tribal plaintiffs. See *Navajo II*, slip op. 2; *United States v. Mitchell*, 445 U.S. 535, 540 (1980) (*Mitchell I*) (acts provide "same access" to relief). But both the Tucker and Indian Tucker Acts vest the Court of Federal Claims—not federal district courts—with jurisdiction, 28 U.S.C. 1491(a)(1), 1505, and, as the court of appeals recognized, the trust claim pressed by petitioners would be enforceable only through those jurisdictional acts. Pet. App. 11 n.3; cf. *id.* at 115 n.6 ("federal question jurisdiction cannot serve as an alternative basis for jurisdiction" in district court).<sup>\*</sup> Thus, even if the court of appeals were incorrect in holding that petitioners failed to identify a duty actionable under the Tucker

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<sup>\*</sup> Petitioners cannot rely upon the Little Tucker Act, 28 U.S.C. 1346(a)(2), as a basis for district court jurisdiction because they seek more than \$10,000 in damages. See Pet. App. 115.

Acts, *id.* at 10-22, petitioners' claim would fail for want of statutory jurisdiction.

b. On the merits, petitioners' underlying contention that "pervasive control and supervision" gives rise to enforceable trust duties was squarely rejected by this Court in *Navajo II*. *Navajo II* explains that a plaintiff asserting an Indian trust claim must cross two distinct hurdles. *Navajo II*, slip op. 2-3. First, the plaintiff "must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Ibid.* (quoting *Navajo I*, 537 U.S. at 506). The plaintiff must therefore make a threshold showing that the government violated "specific rights-creating or duty-imposing statutory or regulatory prescriptions" in order to state a cognizable trust claim, and "neither the Government's 'control' \* \* \* nor common-law trust principles matter" when identifying those duties. *Id.* at 13-14 (quoting *Navajo I*, 537 U.S. at 506); see *id.* at 3 (citing *White Mountain*, 537 U.S. at 477).

After a plaintiff establishes that the government has violated a duty imposed by a specific statutory or regulatory provision, the plaintiff must further show that that substantive provision mandates a damages remedy for the breach. *Navajo II*, slip op. 3, 14 (citing *Navajo I*, 537 U.S. at 506). At that second stage of the analysis, "trust principles (including any such principles premised on 'control')" can "play a role in 'inferring that [a statutory or regulatory] trust obligation [is] enforceable by damages.'" *Id.* at 14 (quoting *White Mountain*, 537 U.S. at 477) (second brackets in original). But such common-law trust principles based on "control" will become relevant only *after* the government's duties have

been defined by specific statutory or regulatory provisions. *Ibid.*

For that reason, *Navajo II* squarely rejected the Federal Circuit's conclusion in *Navajo Nation* that "the Government's 'comprehensive control' over [resources] on Indian land gives rise to fiduciary duties based on common-law trust principles." *Navajo II*, slip op. 13. That holding forecloses petitioners' arguments here. Indeed, *Navajo II* demonstrates that neither *Mitchell II* nor *White Mountain* supports the view that de facto comprehensive control by the government will give rise to trust duties untethered to specific obligations specified in statute or regulation. See *id.* at 6 (statute and regulations created the relevant duty in *Mitchell II*); *id.* at 3, 14 (*White Mountain* invoked "principles of trust law" to determine whether a statutory provision was money mandating); see also *White Mountain*, 537 U.S. at 480 (Ginsburg, J., concurring) ("dispositive question" in *White Mountain* was whether statute was money mandating; it was not the "threshold question" whether the statute "impose[d] any concrete substantive obligations"). *Navajo II* also reverses the sole Federal Circuit decision (*Navajo Nation*, 501 F.3d 1327) upon which petitioners base their claim of a circuit conflict. See Pet. 10-12; *Navajo II*, slip op. 7, 14. And *Navajo II* makes clear that petitioners' allegations regarding a history of government control over Indian housing are irrelevant when identifying the government duties whose alleged breach forms the basis for an Indian trust claim. *Id.* at 14 ("neither the Government's control over [tribal resources] nor common-law trust principles matter").

2. Even if petitioners' contentions were otherwise meritorious, certiorari review in the interlocutory posture of this case would be unwarranted. While the court

of appeals affirmed the dismissal of petitioners' trust claim, it reversed the dismissal of their APA claim, which seeks "an injunction ordering HUD to repair (or, where necessary, rebuild) their homes," and remanded that claim "for further factual development." Pet. App. 23; see *id.* at 22-25. That alternative claim for relief thus has not been resolved. The absence of a final judgment is "a fact that of itself alone furnishe[s] sufficient ground for the denial of [certiorari]." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); accord *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); see *VMI v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (stating that the Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction").

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2009